

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RODNEY MORENO,

Plaintiff,

v.

LLOYD J. AUSTIN, III, Secretary, U.S.  
Department of Defense

Defendant.

No. 2:22-cv-01719-KJM-KJN PS  
ORDER  
(ECF Nos. 5, 11.)

On January 24, 2023, the magistrate judge filed findings and recommendations (ECF No. 11), which were served on the parties and contained notice that any objections to the findings and recommendations were to be filed within fourteen (14) days. On February 13, 2023, plaintiff filed objections to the findings and recommendations (ECF No. 12), which have been considered by the court.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having reviewed the file and the applicable legal standards, the court finds the findings and recommendations mostly to be supported by the record and by the proper analysis, except with respect to leave to amend.

The court adopts the findings and recommendations in full regarding plaintiff's procedural claim. The court also adopts the analysis of plaintiff's discrimination claims and concludes

1 plaintiff has not alleged sufficient facts to give rise to plausible discrimination claims. However,  
2 the court declines to adopt the leave to amend analysis. If a motion to dismiss is granted, “[the]  
3 district court should grant leave to amend even if no request to amend the pleading was made[.]”  
4 *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016). Leave to amend should be denied when  
5 the plaintiff could not amend the complaint to state a viable claim without contradicting the  
6 complaint’s original allegations. *See Garmon v. County of Los Angeles*, 828 F.3d 837, 845–46  
7 (9th Cir. 2016). The key question, as the findings and recommendations acknowledge, is futility.  
8 Here, amendment need not be futile. Although the court acknowledges plaintiff did not identify  
9 additional facts at hearing, *see* F&Rs at 14, ECF No. 11, the court cannot infer from this silence  
10 that plaintiff would be unable to cure the pleadings if given the chance. Plaintiff has not  
11 previously amended his complaint, and he requests the opportunity to do so in his objections to  
12 the findings and recommendations, *see* Obs. at 5–6, ECF No. 12. On this record, the court  
13 cannot conclude amendment would be futile. Because plaintiff could allege facts sufficient to  
14 state viable discrimination claims, **leave to amend is granted**. Any amended complaint must be  
15 filed within **thirty days**.

16 Accordingly, IT IS HEREBY ORDERED that:

17 1. The findings and recommendations (ECF No. 11) are ADOPTED IN PART;  
18 2. Defendant’s motion to dismiss (ECF No. 5) is GRANTED;  
19 3. Plaintiff is GRANTED leave to amend with respect to his discrimination claims;  
20 4. Any amended complaint must be filed within THIRTY days;  
21 5. The matter is referred back to the magistrate judge for all pretrial proceedings not  
22 inconsistent with this order.

23 This order resolves ECF Nos. 5, 11.

24 DATED: March 24, 2023.

25   
26 CHIEF UNITED STATES DISTRICT JUDGE  
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